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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 701

IN THE MATTER OF
BUDDY LYNN WHITTINGTON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY.

BRIEF OF THE FLORIDA COUNCIL OF JUVENILE COURT JUDGES

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INTEREST OF AMICUS CURIAE

The Florida Council of Juvenile Court Judges does and will continue to have a keen interest in all matters pertaining to juvenile problems, proceedings and rehabilitative assistance. Having a long history of measurable success in the area of juvenile delinquency and its curbing and control, Florida is quite naturally interested in any decisions which may be rendered by this Court regarding proceedings in juvenile courts in Florida dealing with the problems made the object of the petitioner's complaint in this case.

Because of this, the Florida Council of Juvenile Court Judges offers this brief as *amicus curiae* pursuant to the provisions of the rules of this Court, to-wit: Rule 42.4.

SUMMARY OF ARGUMENT

I.

This case presents the question of whether the constitutionally permissible standards of proof in a delinquency proceeding shall be maintained as a predicate for finding guilt rather than an unnecessary elevation to the level currently in use in adult criminal proceedings; that is to say, beyond a reasonable doubt.

To suggest a change in nomenclature would result in fairer judicial conclusions regarding guilt or innocence in delinquency proceedings is to say that this will make the trier of fact better able to divine truth. Yet nothing could be further from the truth. In those cases in which the quantum of evidence is found to be deficient a reversal should and invariably will follow for that reason. If, in the aggregate, that condition exists, what matter that the deficiency resulted from a standard proceeding in existence or one which petitioner hopes this Court will ordain? We submit there is none. We submit no change should be made because none is necessary.

II.

Again there are no reasons evident and none have been found to suggest much less justify a conclusion that a juvenile in a delinquency proceeding will not receive a fair trial unless a jury is afforded him.

Aside from the fact that it would be impossible to provide him with a jury of his peers, there is no basis in the doctrine of equal protection upon which petitioner could rely for a claim that he is entitled to a jury trial.

Admittedly no juvenile judge should be allowed to corner the market on wisdom or a claimed ability to have the answer to all the world's juvenile problems. We fail to see how the addition to a delinquency proceeding of a jury panel would do anything in the world toward attaining the result desired with regard to the treatment to be accorded a delinquent. It is simply a fact finding process which occurs thousands of times every day in every criminal case in which a jury is waived. There is nothing constitutionally offensive about an adult criminal trial in which the facts are decided by the judge. There ought not to be anything offensive about its equivalent in a delinquency proceeding. Indeed, if the judge's findings of fact do not comport with reason and law, who can deny that such findings on appeal would be insured the very shortest of life.

III.

We have no quarrel with petitioner's contention that the warnings made obligatory on law enforcement by this Court's decision in *Miranda v. Ariz.*, 384 U.S. 436, 16 L.ed.2d 694, 86 S.Ct. 1602, ought as well to be extended to the interrogation of juveniles involved in violations of state criminal laws.

IV.

Inherent in the overall pattern of the juvenile court system of this country is the desire to work a result with juvenile offenders

quite unlike that made the object of a criminal proceeding. Much of this is accomplished before the matter ever gets to the hearing regarding his delinquency by the disposition made of the juvenile prior to trial. If he is given the unbridled right to a liberty which he would never enjoy at home, then the controls necessary in many instances would be rendered nugatory. There are truly few instances in which custody is the norm. Release is the rule in far and away the greatest number of instances. To make release on bail a constitutional imperative in delinquency proceedings would be to give the juvenile the least chance at rehabilitation, adjustment, correction or a reassessment of values and responsibilities long found to be desirable by most societies since the dawn of time.

ARGUMENT

PRELIMINARY STATEMENT

Obviously no portion of the argument presented here on behalf of the State of Florida is meant in any way to deal with or interfere with any of the matters peculiar to Ohio's jurisdictional or procedural requirements. Florida's argument is and should be considered only as though all of these matters had been resolved and the ultimate legal questions properly ripened so that this Court could either pluck them from the tree or leave them for another time.

POINT I

Lest it be suggested that except for the adjustments made necessary by this Court's decisions in the cases of *Kent v. U.S.*,

383 U.S. 541, 16 L.ed.2d 84, 86 S.Ct. 1045; and *In Re Gault*, ...US....., 18 L.ed.2d 527, 87 S.Ct....., the procedure by which charges of juvenile delinquency are disposed of is the same as that in criminal proceedings, we quickly advise that nothing could be further from fact. It may safely be said that in no state jurisdiction does a juvenile (within the judicial disposition of his case) receive the same treatment as he would in a full-blown criminal proceeding. It is quite apparent that when this case is decided we all will know whether juveniles must be accorded every measure of protection heretofore determined necessary only in adult criminal proceedings.

Three of petitioner's points may be coalesced to a general principal that the fundamental guarantees of equal protection required the same treatment be accorded him as would have been the automatic due of an adult in a criminal trial.

Both practically and legally, this is an argument so patently unsound that it ought to be sufficient merely to state it to show its unsoundness. Unfortunately, this type of argument and thinking is becoming so common that it perhaps requires some attention.

The decisions are legion that the constitutional requirement of equal protection of the law does not forbid a proper legislative classification of persons or things subject to the law. Many of these decisions deal specifically with the juvenile court statutes in different states. The leading decision, often challenged but still standing after more than sixty years, is *Fisher v. Commonwealth*, 213 Pa. 48, 62 A. 198. 5 Ann. Cas. 92 (1905). There the court says:

> "That minors may be classified for their best interests and the public welfare has never been questioned in the legisla-

tion relating to them. Under the act of 1887, the classification of females under 16 years of age means felonious rape, with its severe penalties for what may be done in one day, though on the next it remains simple fornication, to be expiated by a mere fine. * * * The genus homo is a subject within the meaning of the Constitution. Will it be contended that as to this there can be no classification? No laws affecting the personal and property rights of minors as distinguished from adults? Or of males as distinguished from females! * * * "

This case holds specifically that the legislative classification which establishes different types of procedures for children and adults is constitutionally proper. The case discusses the problem in considerable detail, pointing out numerous other areas of legal classification in which persons of different ages, sexes, or occupations have different rights and duties, or are subject to different penalties or impositions.

The only constitutional requirement in the past has been that the classification be a reasonable one in relation to the persons or things classified, and the objects to be accomplished by the legislation.

In respect to the juvenile court laws, the reasonableness of the classification which separates children from adults ought to be clear upon its face, but in a society such as ours, in which the biological facts are blurred or obscured by poor thinking and improper social customs, perhaps it requires demonstration.

From time immemorial, legal codes have made distinctions between adults and children. The Code of Hammurabi, the earliest surviving body of laws, makes such provision. So does the Code of Justinian. *In re People on Behalf of Syson*, 184 Cal.

App.2d 111, 7 Cal. Rptr. 298 (1960). In England, from which our law derives, the Laws of Athelstane, in the Fourth Century, provided special treatment for children. Rappeport, *Determination of Delinquency in the Juvenile Court: A Suggested Approach,* 1958 Wash. U. L. Q. 123, 128.

Perhaps it would be justifiable to depart from precedents, even from a series so ancient in origin, if the reasons for them have ceased to exist, but the reason for these precedents is presently as valid as it has ever been. As one author expressed it (Young, *The Constitution and the Juvenile Court-Letter or Spirit,* 44 J. Am. Jud. Soc'y 93, 97 (1960)):

> "Some of the vociferous critics of the juvenile courts seem to forget what the wise parent knows, for example, that children really are not adults. They do not come to life fully equipped with knowledge and wisdom, like Minerva springing full-panoplied from the brow of Jove. They are not like insects which are hatched complete with all the instincts they need to complete their life cycle. On the contrary, human children start life completely helpless and must come to the rights and privileges of adulthood by slow degrees."

See also, Kennick, *Where Have We Gone Wrong?* THE BLADE, Toledo, Ohio, September 11, 1966, § G at Col. 4, which reads in part as follows:

> "Immaturity is the natural condition of childhood. Unfortunately, many modern parents have come to look upon this condition as bad. They cannot bear to see a child as a child. There is a growing social force which dictates that he must be turned into an adult right away * * *"

It is not difficult to see in this failure to recognize that there is a real difference between children and adults the explanation of much of the difficulty which underlies our present problems of delinquency and youth crime. If a child is to be accorded all the rights and privileges of adulthood, what necessity is there for the child to mature? Adults who are themselves immature children who have never had to grow up, are unabe to lead their own children to maturity in a vicious circle which is nowhere so apparent as in the juvenile courts.

There is further reason why the classification which makes constitutional the juvenile court laws must logically be permitted to stand. That reason is that if it is unconstitutional to provide separate procedures for children who are accused of crime, it is equally unconstitutional to place them under the disabilities of minority for any other purpose, since the same legal and factual bases underlies all clasifications. The right to vote, the right to operate a motor vehicle, the right to marry, the right to purchase and use intoxicating beverages, the right to engage in any occupation, are all governed, in every state, and in the United States, by the factor of calendar age. Equally, the obligations of compulsory education and military service are governed by age.

Since this Court has recently recognized that it is proper to distinguish between children and adults, by referring to "the commendable principles relating to the processing and treatment of juveniles separately from adults" *In re Gault*, supra, and the child's right to be proceeded against in the juvenile court, *Kent v. U.S.*, supra, we ask this Court to overrule the petitioner's broad contention in his questions presented that the juvenile court statutes involved which are not identical with criminal statutes deny him the equal protection of the law.

Perhaps the least critical of petitioner's arguments is the one in which he claims a denial of due process as well as equal protection because the finding of delinquency was based upon an impermissible standard of proof, to-wit: a preponderance of the evidence. Petitioner opts for a rule from this Court that to require any less in a juvenile proceeding than proof beyond a reasonable doubt such as is automatically the basis in an adult criminal proceeding, denies him equal protection without any cognizable reason therefor and due process even if there seems to be a reason.

Obviously, as we have said *ante*, there are innumerable reasons, most of which were acknowledged by this Court in *Kent*, supra, and *Gault*, supra, to classify juveniles differently from adults charged with a crime. Accepting that predicate and assuming that the disposition made of a juvenile in a delinquency proceeding must be swift if the hoped for cure is to work, can it be said that an extensive network of disproportionate guardrails be erected around him in order to insure that he be given the treatment?

It almost seems idle to suggest that a preponderance of the evidence is a sufficient standard of proof in a juvenile proceeding as a general rule [see 31 *Am. Jur.2d*, Juvenile Courts, 339 (1967)] since that salutary pronouncement is here challenged. Admittedly, the day after a bad decision is not soon enough to reverse it. See *Gideon v. Wainwright*, 372 U.S. 345, 9 L.ed.2d 799, 83 S.Ct. 792.

The question redounds: Why is a preponderance of the evidence less to be desired in terms of due process or equal protection than proof beyond a reasonable doubt? Oh, it is a temptation to suggest that any fool would know the difference yet it

is respectfully submitted that there is precious little, if indeed any, difference except perhaps in nomenclature. In passing, we observe that when this Court rendered its decision in *Gault*, supra, it did not seem perturbed with the precise matter although Arizona's Supreme Court had held that proof by clear and convincing evidence was appropriate in a delinquency proceeding.

As will be demonstrated post, only a handful of jurisdictions either permit or require juries in juvenile proceedings. At least until this Court disposes of the petitioner's case, it may accurately be said that far and away the greatest number of delinquency proceedings are heard exclusively by a juvenile judge and not a jury. We do not think it unfair to conclude that proof beyond a reasonable doubt (as in a criminal case) is a cautionary instruction to a jury that they shall not cavalierly condemn one charged with crime to penal servitude and a lifetime brand. We do not instruct judges. We instruct juries. Lay juries must be instructed because they are not privy to the law. Judges are the oral arm of the law, nay, they are the law. Would it not follow that a juvenile whose delinquency charge is to be heard by a juvenile judge must measure his entitlement to a different standard of proof against an adult charged with crime who waives a jury trial and has his case heard by the judge alone? Is there any difference between the standard of proof employed by the juvenile judge in that case and the judge in the criminal case? We submit there is not a trace of difference.

No thinking individual would deny that a judge in a delinquency proceeding hearing the case *nisi* would consider it just as inadequate, or, as the case may be, adequate without regard to the standard of proof allegedly required. He, being trained in the law and habitually sitting as both the trier of the fact and

the trier of the law will consider the evidence adduced as either proving delinquency or not proving it as the case may be. If there is any measurable differences between the two (2) standards, we submit it is only one which finds its way to a jury to insure that their lay views do not replace reason.

Just what is it we are talking about? We respectfully submit that the object of the controversy in this point is what will an appellate court, reviewing a finding of delinquency, consider to be an appropriate basis upon which to either affirm or reverse that finding.

Counsel is now assured in delinquency proceedings—*In Re Gault,* supra.

Confrontation of witnesses is now assured in delinquency proceedings—*In Re Gault,* supra.

Appeals are now assured from delinquency proceedings—*In Re Gault,* supra.

Many of the facets of due process are or will be assured in delinquency proceedings so that there seems to be no deficiency in that regard, at least at this writing. Let us therefore assume that this Court could be prevailed upon to order that the burden of proof be elevated from that of a preponderance to one of a reasonable doubt. Would it then follow that any appellate court in the land would be more likely to affirm a finding of delinquency simply because the nomenclature of the fact finding process had been changed? Or is it now a fact that appellate courts throughout the land are less inclined to affirm simply

because the nomenclature of the fact finding process has not yet been changed? Would it follow that fewer cases would be reversed if the delinquency finding was one made ostensibly under some magic phrase called beyond a reasonable doubt? We think not. Judges of juvenile courts make findings of fact which, in their best judgment, satisfy them that the charge of delinquency has been proved. It is that finding, however reached which is up for review whenever an appeal therefrom is taken. If the finding is unsupportable, it is reversed not because it was not made as a result of proof beyond a reasonable doubt but rather because it is one which the appropriate appellate court simply feels could not have been reached based upon the quantum of evidence. This would not change no matter what the burden of proof was designated. All appellate courts do when they consider the sufficiency of the evidence with regard to a finding of delinquency is to decide whether, taken in its best light, there has been a sufficient showing to satisfy the finding. It could not matter at all that that sufficiency wears one name in one proceeding and a different one in another. It is just as adequate or as the case may be, deficient, no matter what you call it.

It seems apparent that what petitioner seeks is a useless addition which would lend nothing whatever to the proceedings that were calculated to insure treatment which does not run afoul of due process. Believing that, one should wonder at just what, if anything, it could possibly add to a delinquency proceeding.

POINT II

Here we take no issue with so much of petitioner's argument as directs itself to the alleged over participation of the trial judge in his case, leaving that to the litigants. We will instead

address ourselves to the second portion of his argument, that is to say that he should have been afforded a jury trial.

In *Palko v. Conn.*, 302 U.S. 319, 82 L.ed.288, 58 S.Ct. 149, the Supreme Court, speaking through Justice Cardozo, in rejecting the proposition that those rights secured by the Bill of Rights were made applicable to the states by operation of the Fourteenth Amendment, stated, at page 291:

> "* * * The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. *This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.* * * *" (Citations omitted) (Emphasis supplied)

Justice Cardozo, in his opinion, pointed out that some provisions of the Bill of Rights had been made applicable to the states while others had not. Justice Cardozo explained this inconsistency in the following manner:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. *The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as*

fundamental". Snyder v. Massachusetts, supra (291 U.S. p. 105, 78 L.ed. 677, 54 S.Ct. 330, 90 A.L.R. 575); Brown v. Mississippi, supra (297 U.S. p. 285, 80 L.ed. 686, 56 S.Ct. 461); Hebert v. Louisiana, 272 U.S. 312, 316, 71 L.ed. 270, 272, 47 S.Ct. 103, 48 A.L.R. 1102. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. * * *" 302 U.S. 319, 325, 82 L.ed. 288, 292, 58 S.Ct. 149. (Emphasis supplied)

So far as can be ascertained by this writer, this Court has never receded from this position, notwithstanding this Court's recent pronouncements in regard to the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792 (1963), the right to confrontation, *Pointer v. Texas*, 380 U.S. 400, 13 L.ed.2d 923, 85 S.Ct. 1065 (1965), and the right to compulsory process. *Washington v. Texas*, ...U.S....., 18 L.ed.2d 1019, 87 S.Ct. .....(1967).

In the last referred to case, Justice Warren, speaking for eight (8) members of the Court, said in regard to the Sixth Amendment and its application to the states:

"* * * At one time, it was thought that the Sixth Amendment had no application to state criminal trials. That view no longer prevails, and in recent years we have increasingly looked to the *specific guaranties* of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law. We have held that due process requires that the accused have the assistance of counsel for his defense, that he be confronted with the witnesses against him, and that he have the right to a speedy and public trial.

"The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in In re Oliver, 333 U.S. 257, 92 L.ed. 682, 68 S.Ct. 499 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:

"'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 U.S., at 273, 92 L.ed. at 694 (footnote omitted).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." 18 L.ed.2d 1019, 1022, 1023.

The rights which have been regarded as essential to a fair determination and therefore essential to due process have all been those rights which insure or provide complete access to the facts and which provide that the trier of the facts will hear both sides of the issue. This is proper and necessary because regardless of who determines the innocence or guilt of the accused, the judgment will only be fair and just if all the facts are presented to

it. Or stated another way, if the trier of the facts, be he judge or jury, has only heard one side of the issue, material facts being kept from them, can their judgment be fair? Can it be said, however, that a person has not been accorded a fair hearing because he was judged by one person rather than six? Assuming an accused has been accorded every opportunity to present the facts to the trier, can it be said that because a judge, rather than a jury, decided the matter, the accused did not obtain a fair and just determination?

It is submitted that this distinction is controlling. Furthermore, it explains why the right to indictment by a grand jury has not been made applicable to the states by virtue of the Fourteenth Amendment. *Blakesley v. Crouse* (10 Cir. 1964), 332 F.2d 849, cert. den. 379 U.S. 949. See also, *Saunders v. Buckhoe,* (6 Cir. 1965), 346 F.2d 558; *Beck v. Washington,* 369 U.S. 541, 8 L.ed.2d 98, 104, 82 S.Ct. 955; and *Hurtado v. Calif.*, 110 U.S. 516, 28 L.ed. 232, 4 S.Ct. 111.

As has been pointed out herein above, counsel for petitioner has cited no authority which specifically holds that the due process clause of the Fourteenth Amendment requires the state to afford an accused a right to trial by jury. The reason, of course, is because no such authority exists! In fact the unanimous authority is to the contrary. *Palko v. Conn.*, supra; *Fay v. New York,* 332 U.S. 261, 91 L.ed. 2043, 67 S.Ct. 1613 (1947); *Irvin v. Dowd,* 366 U.S. 717, 6 L.ed.2d 751, 81 S.Ct. 1639 (1961); *Lane v. Warden, Maryland Penitentiary* (4 Cir. 1963), 320 F.2d 179; *U.S. ex rel. Silva v. Commonwealth of Penn.* (D.C.E.D. Penn. 1961), 196 F.Supp. 51; *Ex Parte Whistler* (D.C.E.D. Wis. 1945) 65 F.Supp. 40; *New Jersey Chiropractic Ass'n v. State Board of Medical Examiners* (D.C. N.J. 1948), 79 F.Supp. 327; *Martin v. State,* S.Ct. Ark. 1948, 211 S.W.2d 116.

Although *Kent v. United States*, supra, and *In Re Gault*, supra, have introduced into the juvenile court some of the traditional trial court procedures and safeguards which adult defendants enjoy, it would be a fallacious interpretation of these cases to contend that this Court now requires juveniles to be treated exactly as adults. While the *Gault* decision, supra, did not address itself specifically to the question of right to jury trial for juveniles, there is language in the majority opinion to the effect that the Court did not intend to bring in all Sixth Amendment rights by implication along with those due process elements expressly enumerated. The Court quotes from its earlier opinion in *Kent*, supra, where it was said:

> "'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.'" 383 U.S. at 562.

> "We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution." 387 U.S. at 30.

This Court in *Gault*, supra, thus appears to be attempting a balance between the better aspects of juvenile and adult criminal procedure, and not obliterating all distinctions between the two.

Despite the fact that no federal decisions have held jury trials mandatory in juvenile proceedings, clearly the states have the right to utilize a jury as the finder of fact. However, most states have not seen fit to do so. In the Task Force Report on Juvenile Delinquency and Youth Crime, prepared as an augmen-

tation to the 1967 general report of The President's Commission on Law Enforcement and Administration of Justice, it is stated at page 38:

> "Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these states that trial by jury is not crucial to a system of juvenile justice.

As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.

> "As has been observed, 'A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge.' " (Quoting from Paulsen, "Fairness to the Juvenile Offender," 41 Minn. L. Rev. 547, 559, 1957).

When the uniuqe functions of a juvenile judge are considered, it is apparent that the addition of a jury to the proceedings well might impair the court's effectiveness as a rehabilitative influence upon the child before it, as well as not affording a better fact-finding process, for the judge in a juvenile court is much more than a trier of fact. He has the delicate task of communicating and relating to the child, establishing rapport with him, so that the child will be receptive to the court's efforts in deterring an anti-social adult life, and will have his behavior patterns permanently altered.

What, if anything, shall we decide about the really pointed question of how we provide a juvenile with a jury of his peers? Certainly no one among us would argue with the proposition that the peers of a juvenile are not permitted to serve on juries. Admittedly, the juvenile is not to have friends on his jury. *Hoyt v. Fla.*, 119 So.2d 691, aff 368 U.S. 57, 7 L.ed.2d 118, 82 S.Ct. 159. Just as surely it would be quite wrong to have adults sit in judgment of a youthful offender when all their collective histories would either auger for or marshal against the activities charged. Is this a better method of arriving at fact than that which currently exists? Not hardly. It has not been a critical ingredient to due process. It is not now a critical ingredient of due process. Hopefully this Court will agree that it ought never to become one.

POINT III

Florida's position ever since the return of this Court's decision in the case of *Miranda v. Ariz.*, 384 U.S. 436, 16 L.ed.2d 694, 86 S.Ct. 1602, has been to advise all levels of law enforcement that its mandates were of equal applicability when a juvenile was found in the circumstances contemplated by *Miranda*, supra. While it might be true that the precepts of Miranda, supra, would not necessarily be required in a purely juvenile proceeding either on the matter of dependency or delinquency, there is no way in which an interrogating officer could know before hand that this would follow rather than an order binding the juvenile over for trial as an adult. Therefore a confession unleavened by Miranda's warnings would, at least in those instances, be completely valueless. Florida has no quarrel whatever with a proposition which would extend Miranda's protective pale to juvenile's being interrogated under the circumstances enumerated therein.

POINT IV

Here petitioner would seek the aid of this Court of placing him in a position comparable to that of an adult charged with a crime—with regard to being released on bonded bail or some other form of pre-hearing release.

We must assume that he considers himself to be entitled to the same degree of liberty to which an adult would be entitled were it not for his pretrial restraint. Obviously there can be no question that under most state laws anyone charged with a crime less than capital where the proof is evident and presumption great, is entitled to bail pending trial. It well may be that with the decision in this case will come a definitive recitation of whatever factors may be said to insure bail as a federally assured constitutional right or indeed the more preferable, that there is no federally assured right to bail.

An adult charged with a crime is free to roam the perimeters of this earth if that be his pleasure, certain in the knowledge that his only obligation (if he cares to meet it) is to answer the call of the court. Does a juvenile, whether he be charged with an act of delinquency or otherwise, have the right to go to Ogden, Utah, or Taos, New Mexico, or Monon, Indiana, or indeed anywhere else as a matter of right? Is it not really a case of a juvenile being entitled to custody rather than liberty? If he has parents who are living and are fit and able as custodians, they and they alone shall, in ordinary circumstances, limit his activities and geographical wanderings. If he is charged with an act of delinquency and is released on bail, how does he manage to gain that degree of liberty to which he would not be entitled if he had not run afoul of the law? Do we not give him more under petitioner's position here than any juvenile has ever

had as a matter of right from interested and feeling parties or lawful custodians?

Speaking for Florida (see Chapter 39, Florida Statutes) and indeed for most, if not all, other jurisdictions, it must be obvious that the detention of a juvenile charged with an act of delinquency is far and away the exception rather than the rule. It is in only the most stringent of circumstances that a juvenile judge will order a juvenile to be held rather than released. If bail becomes an ingredient of a transferred due process in juvenile proceedings, then indeed in all those instances in which a juvenile judge could have initiated a desirable pretrial release to the parents (as is almost overwhelmingly the case throughout the land), he would then have to yield that right, surrender the juvenile to either a bail bondsman or to some other custodian found acceptable in the circumstances. If it is a bondsman, certainly there can be no doubt that a person so situated is indeed, in a marked degree, at the mercy of his bondsman who may, whenever it suits his fancy, surrender the principal. It is certain that parents who now receive the custody of their accused child will continue to behave with much more compassion and charity toward their offspring.

Relatively little has been said in courts of law regarding bail for juveniles in delinquency proceedings. The cases in which it has been discussed are as follows: *State v. Franklin*, 202 La. 439, 12 So.2d 211 (1943); *Trimble v. Stone*, 187 F. Supp. 483 (D.D.C. 1960); *State ex rel. Peaks v. Allaman*, 115 N.E.2d 849 (Ohio App. 1952); *Ex parte Cromwell*, 232 Md. 305, 192 A.2d 775 (1963); *Application of Jacobsen*, 278 App. Div. 945, 104 N.Y.S.2d 949 (1951).

Since the authorities set out above are rather evenly split, it seems clear that the matter, as it may be treated here, will liter-

ally be a first impression writing since neither of the decisions turned on a federally assured right to bail in a state court juvenile proceeding.

Under Florida law a juvenile has no right to bail when he is processed in a juveaile court upon a charge of delinquency, but, as we have said, seldom if ever is he detained. See Section 39.03, Florida Statutes, which delineates the limited instances in which the child is to be held in custody. There are comparable statutory provisions throughout the several states which approximate the same result either to a greater or lesser degree. To make it a matter of right rather than the sound discretion which for many, many years has proved to be more than a satisfactory disposition of an accused juvenile, would amount to judicial overkill. It would destroy what well may be the healthy situation of a sensitive and feeling juvenile judge whose concern is and should be to see that the normal surroundings of the juvenile can remain relatively undisturbed and free of outside influences while at the same time marshalling the forces available to reach an intelligent conclusion regarding guilt and making an appropriate disposition of the matter thereafter. If bail is imposed as a matter of right, who can deny that a juvenile judge would be required not only to set it or its conditions but as well to release the juvenile when it well might be in the best interest of the child to have been kept in some form of non-parental custody. Indeed, if bail, in its pure form, were required as a constitutional imperative, the child might be released to a bondsman rather than to his parents. The illustrations of possible incongruity are almost limitless if bail or prehearing release is ordained as a matter of an Eighth Amendment right.

To the detractors who urge, by a parade of the horribles,

that it is unconscionable to tolerate admitted excesses in some instances, we shout most loudly that there is a swift and sure remedy for such excesses—the grand writ of *habeas corpus* before whom all custodians must answer on the court's demand. It stands as the bulwark against those few tyrants who would cloak themselves with judicial raiment.

Obviously the discretion vested in a juvenile judge regarding the prehearing disposition of a juvenile in his court is considerably broader than that of a judge of a criminal court who, in most instances, must release one charged with crime on bail if an acceptable arrangement is made. But we are not dealing with individuals charged with a crime nor are we concerned with restoring an adult human to his state of liberty. If anything, we are making an intelligent assessment of just which custody would best suit the needs of juveniles prior to the time that their case is to be heard. Adults have no need which courts feel constrained to protect as juveniles do. Indeed the needs number in the dozens and as often as not if the juvenile court were not there to see to them, they would go untended and perhaps work irreparable damage to a process which our best minds have concluded is the best they know how to structure. Bail only insures liberty—it makes no provision for the needs of a juvenile, As we have said before, a juvenile, unlike an adult, has no right to liberty but only to modified custody. Admitting this, does it not follow that if a form of custody is the net result of his release that bail in its pure sense or indeed in a modified form, would fly into the teeth of that salutary principle. If he is to be as free as we think of an adult being free on bail, who will there be to answer to his needs as he goes blithely on his way knowing full well that each and every time he may be arrested he has but to arrange for his release and go laughingly on his way again. A delightful prospect

for most juvenile delinquents in their day and time but a monstrous well from which springs all sorts of creatures, moods and behavioral miasmas which will surely rise up to plague him when that happy (?) time has passed?

This Court found in *Kent v. U.S.*, supra, that no juvenile court acts, however well intended, could confer a license for arbitrary procedure. Indeed, they never would. We doubt that any do. With appellate review now assured by *Gault*, supra, anything arbitrary is surely guaranteed a brief existence. In point of fact any of the excesses proscribed both in *Kent*, supra, and *Gault*, supra, should be easily laundered on appeal in light of those two cases.

We ask about the situation which often prompts a delinquent hearing—the parents genuinely feeling themselves unable to handle an allegedly incorrigible child. Whatver their deficiencies as parents, they have at least recognized the fact that some action must be taken with regard to their offspring. In their genuine concern, are they to be denied the inalienable right of control they have over their child only to see it turned over to a stranger before a court can decide, after a hearing, what is best for that child? If that concern, born of love for their child, though not buttressed by their ability to rear it well, is not to be relegated into the dim recesses of the past, we must not set him free to roam without direction or control.

CONCLUSION

Those things most vigorously argued for here by petitioner if ultimately given others by this Court, would do little more than cloak them with the facade of due process which even if

meticulously followed, would do nothing more than diminish the helpful and beneficial treatment received in the juvenile courts of this land.

To liken the proceedings to those in a criminal court is to turn one's head away from the obvious differences.

The criminal court has two obligations, first, to see that no one is improperly convicted of a crime or offense, and second, to impose condign punishment upon those who are, by due process of law, found guilty of a violation of law. No one disputes that a juvenile court has the first of these obligations also, but there is another, and at least equally important, obligation upon the juvenile court, that is, to endeavor to turn each child in trouble into a useful and productive adult. An undue insistence on procedural matters has a strong tendency to defeat this last obligation.

> "While the criminal court exists to convict the guilty, the juvenile court exists to protect and correct them. Whenever the juvenile court must also convict, it is in danger of defeating its main purpose. To help the child change his attitude, a 'clean breast,' a confession, is a primary prerequisite, a *sine qua non*. Otherwise the court would be trying to help the child build his new life on a foundation of falsehood and deceit, like building his house on sand instead of the rock of truth and honesty. Of course, if the child should happen to be innocent, the court couldn't touch him and it wouldn't try to. If he happened not to be, but still maintained he *was* innocent, the court might as well *not* try. At least that's what end results seem to indicate." Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A.J. 1206, 1208 (1960)

This Court has said that:

> "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *In Re Gault*, 387 U.S. 1, 28 (1967).

There will perhaps never be a better time to make an intelligent assessment of the advisability of implementing as constitutional mandates three (3) key requirements which will never help to make a boy a man. To simply tap him with a wand of extended due process when all reason indicates a contrary course should be followed, would be no better than to provide him with a straw hat in a blizzard. He needs help within the existing framework of due process articulated so well in *Gault*, supra. To give him what petitioner here suggests is absolutely vital would not even come close to providing him with a better chance—indeed there is every reason to believe that it would hamper courts in the process.

WHEREFORE, this Court is respectfully requested to give such consideration as it feels appropriate to the matters argued and the several positions taken in this brief.

Respectfully submitted,
Florida Council of Juvenile Court Judges
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